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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GEN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its Comments in response to the Notice of Inquiry in the above captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

In its regulation of CMRS, the Commission has consistently relied upon competitive market forces, rather than government mandates, to stimulate the development of innovative mobile wireless services. This deregulatory approach has helped foster a dynamic, competitive CMRS marketplace that has experienced tremendous growth with reductions in prices and

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

2 Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GEN Docket No. 00-185, *Notice of Inquiry*, FCC 00-355 (rel. Sept. 28, 2000) ("Notice").

increases in quality.[3] To the extent the Commission would consider in this proceeding applying open access requirements on the data services offered by CMRS providers, these same deregulatory principles govern and similarly mandate maximum regulatory forbearance.[4]

When considering whether to impose a duty to deal, which is directly intended to correct an apparent failure in the competitive operation of the market, the Commission must begin by determining whether any single operator, or group of operators acting in concert, would have the ability to act in a manner that could be detrimental to consumers. Stated differently, before imposing an open access requirement, the Commission must first decide whether there is market failure. If none can be demonstrated, that should be the end of the Commission's inquiry.

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3 See generally Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Fifth Report*, FCC 00-289 (rel. Aug. 18, 2000) at 9-18 ("Fifth CMRS Competition Report").

4 In the Notice, as in other proceedings, the Commission has defined advanced telecommunications as "'high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications using any technology' which offers 200 kbps of bandwidth to and from a subscriber." Notice at 10-11, n.43 (citations omitted). Presently, data services offered by CMRS providers do not approach 200 kbs. See Evolution to 2.5G; A Key Hurdle in the Transition to the Mobile Information Society, UBS Warburg at 19-20 (Nov. 6, 2000) (noting that AT&T Wireless offers data rates of 19.2 kbs and is not expected to deploy technology that will reach higher speeds until 2002 and that Sprint PCS and Verizon Wireless are expected to deploy new infrastructure in 2001 that will allow them to reach a maximum speed of 144 kbs). The Commission, however, has sought in this proceeding "to develop a record that examines the full range of high-speed service providers, including providers that use cable, wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies." Notice at ¶ 3; see also id. at ¶ 43 (noting that Section 332 creates a separate legal framework for wireless provision of high-speed data services). CTIA, therefore, takes this opportunity to discuss the development of data services offered by CMRS providers, and to suggest that the Commission maintain a deregulatory approach to these and other CMRS services.

In the case of the CMRS industry, the Commission has consistently found, and recently reaffirmed, that it is workably competitive. Most American consumers have a choice of between five and seven mobile wireless providers. Prices for their services have been on a steady decline for years while the number of enhanced service offerings, such as voicemail and caller ID, have steadily increased. Thus, the prerequisite of persistent, sustained market power is missing in the case of CMRS. If the Commission is intent on going forward with an open access requirement for CMRS providers, it must first compose a record that contradicts these recent findings and demonstrates a need for direct regulatory intervention.

II. AS A MATTER OF LAW AND POLICY, OPEN ACCESS REQUIREMENTS SHOULD ONLY BE IMPOSED IN INSTANCES OF MARKET FAILURE.

The Commission has consistently taken a forward-looking approach to regulating CMRS,[5] which accounts for the present competitive state of the CMRS market and the wealth of new services being provided to consumers.[6] The Commission should be guided by the same philosophy when considering open access issues that may be applicable to CMRS providers.

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5 See Implementation of Sections 3(a) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, GN Docket 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1418-1422, 1478 (1994) (declining to impose tariff requirements on CMRS providers, concluding instead that "[c]ompetition, along with the impending advent of additional competitors, leads to reasonable rates.") ("CMRS Forbearance Order"); Regulatory Treatment of Mobile Services, GN Docket 93-252, *Third Report and Order*, 9 FCC Rcd 7988 at ¶ 14 (rel. Sept. 23, 1994) ("CMRS Third Forbearance Order") (deciding "to take an expansive view of the present condition of competition among services in the CMRS marketplace, and of the potential for competition among these services in the future, because such a view maximizes the range of services that can be considered to be substantially similar.").

6 Such actions respond to the congressional mandate to forbear from unnecessary regulation of CMRS, as required by the 1993 amendments to section 332 and the 1996 amendments to Section 10. See 47 U.S.C. §§ 332(c)(1)(A), 160.

Before imposing regulatory mandates such as open access, the Commission must first consider whether firms operating in the marketplace exercise persistent, substantial market power.[7] The relevant inquiry presently before the Commission is to determine to what extent the market needs government intervention in the form of imposing a duty to deal.[8] In a competitive, dynamic environment where no firm exercises control over bottleneck facilities, such obligations are ill-advised and unwarranted. Rather, the Commission should be guided by the long established and well considered judicial precedent that a firm, absent persistent, sustained market power, should be free to choose whether to deal with another firm.[9] As the Commission has previously found, a general duty to deal is imposed only where the service provider would likely

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7 See Notice at ¶ 41 ("We stress that, before we will take any regulatory action on this issue, we must first determine that open access is desirable as a policy matter and that market forces are insufficient to achieve this policy objective.") (emphasis added).

8 In its 1999 report on the deployment of broadband technologies, the Cable Bureau agreed, concluding that "[u]nless and until anti-competitive behavior surfaces, it is preferable to allow market forces to propel cable operators and independent ISPs toward an 'open-access' system.") Broadband Today, Cable Servs. Bureau, Report No. CS 99-14 at 43 (October 1999).

9 See U.S. v. Colgate & Co., 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. . . ."); U.S. v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (holding that judicial restrictions on motion picture film distributors were valid only after finding that film producers and film distributors had engaged in both horizontal and vertical restraints of trade). Similarly, monopolization or some effort to monopolize must be found in the CMRS transmission business before the Commission considers imposing restrictions on the ability of carriers to freely contract with data service providers. See also U.S. v. Loew's Inc., 882 F.2d 29, 33-34 (2nd Cir. 1989) (finding that the legal restrictions adopted in Paramount were no longer necessary (at least as applied to one entity) because the film distribution market had become highly competitive).

abuse the public interest if no legal protection were extended.[10] Non-dominant carriers, however, are unlikely to participate in anticompetitive practices and, therefore, need not be subject to burdensome regulatory obligations such as open access.[11] In this instance, without market power, CMRS providers have neither the ability nor the incentive to discriminate or otherwise act anticompetitively in offering data services.[12] Their only incentive is to provide the information products their subscribers most desire.

The CMRS industry exists in a workably competitive environment. In its most recent analysis of competition in the CMRS industry, the Commission concluded that over seventy percent of Americans have a choice of at least five competing mobile phone providers, while

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10 See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket 79-252, *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445, 522 (1981).

11 These concepts were put into practice by the Commission in its Competitive Carrier proceeding. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Notice of Inquiry and Notice of Proposed Rulemaking*, 77 FCC 2d 308, 334-338 (1979); First Report and Order, 85 FCC 2d 1, 31 (1980); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); recon., 93 FCC 2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993, upheld, MCI v. AT&T, 114 S. Ct. 2223 (1994); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984), recon., 59 Rad. Reg. 2d 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985); rev'd, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

12 A duty to deal should be imposed only on a firm (or group of firms) that has a monopoly in the downstream market. Areeda & Hovenkamp, Antitrust Law, ¶ 736.2d (1993 Supp.); see Northwest Wholesale Stationers v. Pacific Stationary and Printing Co., 472 U.S. 284 (1985) (holding that a concerted refusal to deal is not illegal in the absence of market power); see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600 (1985) (holding that even a firm with monopoly power has no general duty to deal so long as it is not improperly using its monopoly power with the intent of injuring rival firms).

eleven million people can choose from among seven different competing carriers.[13] Given the substantial number of wireless carriers operating in every market and the vigorous competition for wireless customers, no single carrier possesses the power to engage in anticompetitive behavior. This is evidenced by the fact that "the average price of mobile telephony has fallen substantially [since 1999], continuing the trend of the last several years. According to one estimate, prices declined by approximately 8 percent during the last six months of 1999. . . . Another analyst estimates that prices fell by 20 percent between 1998 and 1999."[14] Such price competition in markets with five, six, or seven carriers is an irrefutable example of a workably competitive market.[15] Moreover, with the addition of three new major operators with nationwide footprints, along with smaller operations tailoring service offerings to local demands, the Commission can be sure that dynamic competition, both in prices and consumer services, will continue to flourish in this industry.[16]

The Commission's conclusion that the CMRS industry is robustly competitive necessarily means that providers lack persistent, sustained market power or control over essential bottleneck

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13 Fifth CMRS Competition Report at 6.

14 Id. at 19.

15 See 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers; Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap; Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, WT Docket No. 98-205, WT Docket No. 96-59, GN Docket No. 93-252, *Report and Order*, 15 FCC Rcd 9219 at ¶ 30 (1999) (noting that "[i]f there are five competitors [in a market], the likelihood of a cartel falls [from 100 percent] to 22 percent.").

16 See Fifth CMRS Competition Report at 10-11.

facilities. Thus, they lack the incentive and ability to engage in unreasonable or discriminatory activities and should be free to negotiate whatever carriage arrangements they choose. The alternative, i.e. adoption of an open access requirement, especially in an environment where there is no record of market failure, would represent a significant departure from the Commission's ongoing practice of allowing market forces to shape the development of CMRS.

In addition, the marketplace for mobile wireless data services is only now beginning to take shape. In the Fifth CMRS Competition Report, the Commission concluded that just two percent of mobile traffic is currently data, though some analysts forecast tremendous growth rates for these services.[17] In newly developing markets like this one, the Commission has often taken a hands-off approach to regulation, preferring instead to permit the market to drive the deployment of such services with the Commission acting only in instances of market failure. As explained in the Notice, "[t]he Commission has shown regulatory restraint with respect to emerging services in a number of contexts. In the *Computer Inquiries*, for example, the Commission refrained from regulating data processing services, relying in part on the fact that the market for such services, while still nascent, was functioning in a competitive manner."[18]

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17 Id. at 33-34.

18 Notice at ¶ 11; see "Broadband Cable: Next Steps," Address of William E. Kennard, Chairman, FCC, before the Western Show; California Cable Television Association (Dec. 16, 1999) ("There are two choices: we can rely on the market to facilitate openness; or we can try to regulate our way there. For now, I'm putting my faith in the marketplace. Unless a compelling case can be made for government action - a failure of the market to maximize consumer welfare - then we should give the marketplace a chance to work. That's particularly true with the deployment of new technologies. In the mid-1980's, when the telephone companies started to roll out 'information services' - the regulatory forerunner of the Internet - the FCC had the good judgment to allow the phone companies to deploy information services in an unregulated environment. Without that decision to exercise restraint and let the market develop, the Internet as we know it would not exist.") (emphasis added).

Clearly, this same rationale applies to mobile wireless data services. Because it is a nascent service, and because it is growing in a competitive market, the Commission need not consider applying heavy-handed regulatory burdens on the provision of these services.[19]

Finally, the Commission should not use this proceeding to paint all open access issues with the same broad brush. Each circumstance is different and may warrant separate regulatory treatment. In the case of the CMRS industry there is no record of market failure, thus, no reason to adopt open access requirements absent such a finding.

III. CONGRESS AND THE COMMISSION HAVE CLEARLY EXPRESSED A PREFERENCE FOR MARKET DRIVEN RESULTS, RATHER THAN GOVERNMENT FIAT, IN THE REGULATION OF CMRS.

The policies promoted in Section 332, as amended by Congress in 1993, clearly reflect Congress' preference for market solutions over regulation. Specifically, Congress intended to promote a competitive environment for mobile communications characterized by efficiency, open entry, and overall lower costs of doing business, including the reduction of the costs imposed by government regulation. Section 332(a) expressly directs the Commission to consider reducing regulatory burdens on wireless carriers based on marketplace demands.[20] In Section 332(c), Congress permitted the Commission to forbear from imposing particular Title II obligations on CMRS providers, as specified by the Commission, prior to providing the general

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19 See generally Jason Oxman, Office of Plans & Policy, FCC, The FCC and the Unregulation of the Internet, OPP Working Paper No. 31, at 22 (1999) ("Although the FCC has a long tradition of encouraging the growth and development of the Internet by nonregulation, . . . there are frequent calls from many sources for the FCC to become more heavily involved in Internet regulation. . . . The challenge to the FCC . . . is to enter the era of convergence in a way that furthers the Commission's longstanding goal of promoting competition, not regulation, in the marketplace.").

20 47 U.S.C. § 332(a)(2).

forbearance authority in the 1996 Act.[21] Congress presented the Commission with a directive (and the tools) to break with the traditional regulatory model in its treatment of CMRS.

In implementing Congress' intentions, the Commission has consistently preferred competitive forces to govern CMRS development. It noted that the goal of the regulatory symmetry principle found in the 1993 amendments was "to ensure that economic forces -- not disparate regulatory burdens -- shape the development of the CMRS marketplace."[22] For instance, when addressing state attempts to regulate CMRS rates, the Commission observed that "[the 1993 amendments] reflect a general preference in favor of reliance on market forces rather than regulation."[23] In application, the Commission has sought to promote competition within the CMRS industry through deregulatory efforts -- efforts which allow the market rather than government regulation to guide the growth and dynamism of the wireless industry.[24] These

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21 47 U.S.C. § 332(c)(1); see CMRS Forbearance Order at ¶ 14 (The Commission interpreted this provision as a congressional acknowledgment that "neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace.").

22 CMRS Third Forbearance Order at ¶ 4.

23 Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services, PR Docket No. 94-104, *Report and Order and Order on Reconsideration*, 10 FCC Rcd 7824 at ¶ 9 (1995); see id. ("Section 332(c) . . . empowers the Commission to reduce CMRS regulation, and it places on [the States] the burden of demonstrating that continued regulation will promote competitive market conditions.") (citations omitted).

24 See, e.g., Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965 (1996) (eliminating restrictions to allow CMRS providers to provide fixed wireless services as a means of encouraging technical innovation and experimentation); Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Fourth Report and Order*, 15 FCC Rcd 13523 (2000) (permitting market forces to

efforts have proven successful. In fact, the Commission has in the past attributed the rapid development of CMRS competition, in part, to the elimination of unnecessary regulation.[25] Here too, the Commission should stay on the deregulatory path, ensuring that market forces shape the development of wireless data services.

Moreover, regardless of whether the Commission decides to impose open access requirements on cable or other broadband service providers, a decision affecting CMRS carriers should be made on its own merits. In the Notice, the Commission recognized that because "factors such as the differing treatment accorded different providers and services under the Act itself, [a] national framework may or may not impose the same regulatory obligations on all providers."[26] As explained above, there are significant distinctions both in the operation of the CMRS business as well as in a unique legal framework governing CMRS regulation that justify dissimilar treatment of CMRS providers (assuming, *arguendo*, that the Commission elects to impose open access obligations on others). In fact, as made clear in the Notice, this inquiry has

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determine the terms of carrier and reseller interconnection agreements); Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21831 (1996) (permitting broadband PCS licensees to partition and disaggregate their licenses and proposing similar rules for cellular and GWCS licensees as a means of expediting the provision of service to areas not otherwise receiving wireless services and promoting small business entry into CMRS).

25 See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Second Report*, 12 FCC Rcd 11266, 11272 (1997) ("the CMRS market has continued to undergo major changes that have resulted in increased competition. . . . The Commission has facilitated these changes by . . . eliminating unnecessary regulation"); see also id. at 11273 ("The Commission has continued systematically to remove regulatory barriers in order to facilitate competition.").

26 Notice at ¶ 4.

emerged from a series of controversies involving the cable industry.[27] It would thus be wholly inappropriate to impose open access rules on competitive wireless carriers that have been substantially and successfully deregulated as a by-product of issues arising in other parts of the telecommunications industry.

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[27] Id. at ¶¶ 5-10.

IV. CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission maintain a deregulatory framework for CMRS regulation and specifically for high-speed mobile wireless data services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 1st day of December, 2000, copies of the attached document were served by hand delivery on the following parties:

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